Supreme Court, U.S.
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No. 89-31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRIENDS OF WARWICK POND AND HOXSIE
also WARWICK LAND TRUST, PAUL HULING,
JEANNE M. FOSTER, EILEEN NAUGHTON and
KATHLEEN PREISS

Petitioners

vs

CHILDREN'S FRIEND AND SERVICE, INC.,
FRANK P. SHERRY, R & F ASSOCIATES,
RHODE ISLAND CENTRAL CREDIT UNION and
JOHN DOES, ONE through FIVE

Respondents

and JAMES O'NEIL, in his capacity as
Rhode Island Attorney General

Additional Party — Respondent

Petitioners' Second Reply Brief In Support Of A Writ Of Certiorari To The Supreme Court Of The State of Rhode Island

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QUESTIONS PRESENTED

1. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to carve out a new rule denying petitioners standing and apply it retroactively against diligent representative plaintiffs disregarding (a) their demonstrated compliance with the R.I. adopted Federal standing/access barrier test and (b) four prior R.I. Supreme Court decisions and a R.I. statute that the Attorney General, whom the plaintiffs had named at the outset, is but a necessary party to charitable trust litigation.

2. Whether it was plainly untenable, a denial of due process and a violation of Rule 56 of the Rhode Island (Federal) Rules of Civil Procedure to approve the granting of summary judgment on a record which shows (a) that the trial/lower court below's sole ultimate finding was based on a mistaken conception of its decisional authority and (b) that important discovery - addressed to the movants themselves - was still outstanding and (c) that, at most, the defendants had raised merely a mixed question of law and fact.

3. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to give weight to a purported R.I. Attorney General opinion (or finding) of "no fault" in the defendants' sale/purchase of the charitable property at issue ("Lakeside") for commercial real estate development which "opinion" (a) was not part of the record, (b) the plaintiffs had never seen, much less been given an opportunity to answer, and (c) whose existence was not asserted until the February 13, 1989 appellate oral argument.

4. Whether the United States Supreme Court will summarily reverse and remand for further proceedings a case which turns on state adopted Federal law (standing, *res judicata* and Rule 56 summary judgment) all patently violated by the courts below, thus depriving representative plaintiffs of their sole means of preventing monetary, recreational and environmental damage to themselves, their homes and their community.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Summary	1
The Questions Presented are Properly before the Court	2
Denying Petitioners' Standing was Patently Untenable	4
Rule 56 Summary Judgment was Patently Untenable	6
Reliance on an Un-published, Non-record Attorney General's Opinion was Patently Untenable	7
CF&S' Motion for Costs'	9
Conclusion	9
Petitioners' Second Supplemental Appendix	P.S.S.A. 1-41
Excerpts from Plaintiffs' Supplemental Answers to Defendant's Interrogatories, verified January 24, 1988	1-5
Providence Society for Organizing Charity (later Family Service Welfare Society of Providence, now Family Service, Inc.) documents appended to Plaintiffs' Supplemental Answers to Interrogatories, verified January 24, 1988	6-13
(a) Providence Journal article February 29, 1912 as recopied by the Providence Society (Exhibit 12 - Naughton November 10, 1987 deposition)	7-8
(b) Excerpt from "Summer Outings" and Appendix, *circa* December, 1935 (App. pages 10-11)	8-11
(c) Memorandum re conversation with Honorary Counsel George H. Huddy, Esq. January 18, 1936	11-12
(d) Memorandum re Lakeside Property, Charles P. Sisson, Esq., December 11, 1946	13
Excerpts from Plaintiffs' Verified Amended Complaint – Class Action, verified March 30, 1988.	14-18
Excerpts from Plaintiffs' May 19, 1988 Memorandum in Opposition to Defendant's Motion for Summary Judgment	19-21
Excerpts from Plaintiffs' Brief to the Rhode Island Supreme Court (No. 88-0426), filed January 13, 1989	22-31
Excerpts from Plaintiffs' Petition for Reargument to the Rhode Island Supreme Court (No. 88-0426 filed February 28, 1989	32-35
Plaintiffs' Initial Complaint – Class Action, verified August 3, 1987 (appended documents deleted)	36-41

TABLE OF AUTHORITIES

Cases: *Page*

City of Reno v. Goldwater, 558 P.2d 532 (Nev. 1976) . . 5
Israel v. National Board of Y.M.C.A., 117 R.I. 124, 369 A.2d 646 (1977) 5
Leo v. Armington, 74 R.I. 124, 59 A.2d 371 (1948) . . . 5
Michel v. Louisiana, 350 U.S. 91 (1955) 4
Newport *Hospital v. Harvey,* 47 R.I. 382, 133 A.648 (1926 5
Parsons v. Walker, 28 Ill. App. 3rd 517, 328 N.E. 2nd 920 (1975) 5
Powers v. Home for Aged Women, 55 R.I. 187, 179 A. 610 (1935) 5
Rhode Island Opthalmological Society v. Cannon, 113 R.I. 16, 317 A.2d 124 (1974) 4
Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985) 9
Wood v. Georgia, 450 U.S. 261 (1981) 4

Consitutional Provisions, Statutes and Rules:
Constitution of Rhode Island Article 1, Sec. 5 5
28 U.S.C.
Sec. 2106 . . . . . 2, 4, 9
R.I.G.L.
Sec. 18-9-5 5
Rules of the Supreme Court of the United States
Rule 49.2 1
Rule 50.7 1
Federal Rules of Civil Procedure
Rule 56 6
R.I. Rules of Civil Procedure
Rule 56 6

Other:
Redish, *Supreme Court Review of State Court "Federal Decisions: A Study in Interactive Federalism,* 1985, 19 Ga. L. Rev. 861 3
16. C. Wright A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* (1977)
Sections 4021, 4027 and 4031 3

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Petitioners' Second Reply Brief In Support Of Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Rhode Island

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Petitioners now reply to the respondent Children's Friend and Service ("CF&S") brief (and Rules 49.2 and 50.7 motion) received by mail on August 10, 1989.*

Summary

Petitioners brought this class action to protect their homes, their neighborhood, their environment and quality of life — the most fundamental property and liberty rights which anyone can have. (Petition 11) Their demonstration of monetary, recreational and

*Petitioners' reply to respondent R&F's brief was mailed August 11. A third respondent's brief — from the R.I. Attorney General — has since been received to which the petitioners shall also file a separate response.

environmental damage is substantial and fully documented (Petition 4, 7, 9, 11-12, 13-14n, 16; Petitioners Appendix 23-29, Petitioners' Second Supplemental Appendix, *infra* 1-5, 14, 16, 18, 20, 26). The petitioners were simply railroaded. (Petition 2-3, 6-11, 13-14, 17-25) Yet, the respondents say this Court is without power to set straight such fundamental unfairness. They are dead wrong.

In apparent recognition of the inherent weakness in respondents' basic position, CF&S has taken great liberties with the record, distorting Lakeside's charitable trust history and use, its longstanding recreational use and benefit to the surrounding community, the plaintiffs' substantial showing of injury-in-fact damage — (both economic and otherwise), and the *res judicata* consequences of the R.I. Superior Court's 1951 *cy pres* decree (which *was* briefed and re-briefed below, CF&S contrary assertions not withstanding). After two years of deafening silence, CF&S now offers a transparent "explanation" for its right-the-first-time August 1987 admissions of trust title. (Petition 20-21, P.A. 30-31, P.A. 42-44; CF&S brief 25n; see *infra* herein 7). CF&S, like the other respondents, continues to say nothing about its resistance to the petitioners' outstanding discovery demands, including its refusal to produce the contemporaneous records which one would expect to shed light on CF&S' Lakeside title expectations, i.e. *complete*, unexpurgated - (rather than 50-75% in some cases 90% *deleted*) — copies of CF&S' 1950-1951 directors' minutes, (Petition 21; P.A. 32-44; CF&S brief 20-26).

This Court has authority to set straight such manifest, fundamental unfairness. A summary, Section 2106 remand for completion of the petitioners' interrupted discovery will lift respondents' iron curtain and give petitioners' the opportunity to preserve Lakeside for those community purposes for which it was originally donated. (P.S.S.A. *infra* 6-17, 22-26). This is all the petitioners ask. Simple justice demands nothing less.

The Questions Presented are Properly Before the Court

Respondents try but cannot obscure the fact that this case turns on state adopted Federal law — *res judicata; res judicata* and subject matter/fundamental jurisdiction; injury-in-fact standing; Federal Rule 56 and summary judgment principles. (Petition 9n) All were briefed and rebriefed below, respondents' contrary assertions notwithstanding. (Petition 2, 6, 7-9, 9n, 11-4, 18, 19-22, 25 and 28; P.S.S.A. 19-21, 25-27, 29-31, 32-34) Compare, especially, CF&S' assertion that *res judicata* and its application to fundamental subject mat-

ter jurisdiction was not briefed below (Brief 8n) with the obvious fact that it was. [Plaintiffs' January 13, 1989 brief to the R.I. Supreme Court, pages 13-14 (P.S.S.A. *infra* 30-31) and plaintiffs' February 28, 1989 petition for reargument, pages 5-6 (P.S.S.A. *infra* 33-34); petition for certiorari 9n, 17-18].

This Court has the authority to review state decisions that are determined by adopted federal rules and case law. Indeed, distinguished scholars, giving good reasons, have recently recommended just that. 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice* and *Procedure* (1977) Section 4021, 4027 and 4031 (petition 26-27; and Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions; A Study in Interactive Federalism,* 1985, 19 Ga.L. Rev. 861, 901-903, 907. Supreme Court review is especially appropriate, in cases like this which concern the interpetation of the Federal Rules of Civil Procedure. Wright *supra, Sec. 4031 at 768; Redish supra* at 865-866 (Petition 20n, 26).

Beyond Rhode Island's adopted federal law lies the plain error below in breach of federal constitutional standards. Regarding standing, petitioners could hardly have anticipated that the R.I. Supreme Court would ignore four prior decisions and one R.I. statute, most recently interpreted in 1977, and announce a retroactive rule that only the Attorney General could sue (and in a case where the plaintiffs had donated considerable time, money and effort). Such was "manifestly unfair" to the petitioners, as firmly stated in their February 28, 1989 petition for reargument, words which should have sufficed to remind the court below that due process standards had been breached. (Petition 27).

The standing ruling below in support of the Attorney General, followed his so-called opinion or "finding" of "no fault" (in the Lakeside commercial sale) which surfaced for the first time at the February 13, 1989 oral argument (P.S.S.A. *infra* 34) when his role suddenly changed from that of a passive participant to that of active adversary. (Petition 22-23; P.S.S.A. 34). Petitioners' February 28 reargument application — prepared on extremely short notice (petition 10n) made it clear that the court below had given weight to a non-record document which the petitioners had never been given an opportunity to examine or answer. (Petition 9-10, 27-28; P.S.S.A. 34-35). The Attorney General's about-face aggravated the fundamental unfairness already noted in the plaintiffs' reargument petition concerning the court's retroactive ruling that only the Attorney General had standing to protect Lakeside. (Petition 27-28; P.S.S.A. 34-35).

Given the lack of time and opportunity, the prior detailed briefing under state adopted federal law and the arguments made in the plaintiffs' reargument petition below, it would be entirely appropriate for this Court to address these issues by writ of certiorari. *Michel v. Louisana* 350 U.S. 91 (1951); *Wood v. Georgia* 450 U.S. 261 (1981) (CF&S brief 10). Alternatively, in view of the plain error and fundamental unfairness below and, as *Wood* also declares and as the petitioners request, the Court should summarily remand for completion of petitioners' short-circuited discovery. As stated in *Wood* at 265n:

> In this context, it is appropriate to treat the due process as one "raised" below, and proceed to consider it here. See *Boynton v. Virginia*, 364 U.S. 454, 457 (1960) (decided on a statutory issue raised below but not raised in this Court). Even if one considers that the conflict-of-interest question was not technically raised below, there is ample support for a remand required in the interests of justice. See 28 U.S.C. Sec. 2106 (authorizing this Court to "require such further proceedings to be had as may be just under the circumstances"); R. Stern & E. Gressman, *Supreme Court Practice* Sec. 627, p. 460 (5th ed. 1978) (in review of state cases, "the Court doubtless limits its power to notice plain error to those situations where it feels the error is so serious as to constitute a fundamental unfairness in the proceedings"). See also *Vachon v. New Hampshire*, 414 U.S. 478 (1974).

Under the circumstances of this case there is no basis for CF&S' assertion that the petitioners should receive no Section 2106 relief on grounds that petitioners are not lawfully before the Court.

Denying Petitioners' Standing was Patently Untenable

CF&S tries to avoid Rhode Island's adopted federal injury-in-fact standing law* by asserting that the plaintiffs have shown none. (Brief 11-16). This is gross distortion of the record. The petitioners' demonstration of injury - monetary, environmental and recreational - has been overwhelming. Such showing includes the February 20, 1987 letter of the R.I. Audubon Society's distinguished

*The injury may be "economic or otherwise". The line is drawn, not between injury and substantial injury, but between injury and no injury. *See*, for example, *Rhode Island Ophthalmological Society v. Cannon*, 113 R.I. 16, 316 A.2d 124, (1974), CF&S brief 12n.

executive director, Alfred L. Hawkes (P.A. 24, 26-29); the petitioners' detailed supplemental answers to *CF&S* interrogatories, verified January 24, 1988 (P.S.S.A. *infra* 1-5, 14; see also P.S.S.A. 19-20 and petition 12n); their March 30, 1988 verified amended class action complaint, pars. 14, 26 and 35-37 (P.S.S.A. 14, 16 and 18); and the petitioners' May 19, 1988 memorandum in opposition to CF&S' motion for summary judgment (and sources cited therein) P.S.S.A. 19-20). [On CF&S's own citations, petitioners' loss of outdoor recreation activities and neighborhood quality alone suffice to meet federal injury requirements. (Brief 15n, 16n)]

Lastly, CF&S argues that, notwithstanding the petitioners' demonstration of injury-in-fact standing, only the Attorney General can sue. The four principal R.I. Supreme Court cases cited (18-19) — *Newport Hospital v. Harvey*, 47 R.I. 382, 133 A 648 (1926), *Powers v. Home for Aged Women*, 55 R.I. 187, 179 A. 610 (1935), *Leo v. Armington*, 74 R.I. 124, 59 A.2d 371 and *Israel v. National Board of Y.M.C.A.*, 117 R.I. 614, 369 A.2d 646 (1977), all show that the Attorney General is *not* the sole person who may bring suit to enforce charitable trust duties and that making him a party, as the petitioners have done, is sufficient. Moreover, while paying lip service to cases previously cited by the petitioners (petition 14-15), CF&S totally ignores the Rhode Island statute (construed in *Israel supra*), which petitioners also cited and reproduced, R.I.G.L. Section 18-9-5. (Petition 14-15, P.A. 6.) Section 18-9-5 provides for notice and participation opportunity, nothing more. (P.A. 6) Having been made a party, the Attorney General was given every opportunity to participate in this case and thus insure that the public's rights are fully protected. This is all that *Newport Hospital* (1926), *Powers* (1935), *Leo* (1948) *Israel* (1977) and R.I.G.L., Sec. 18-9-5 *supra* require. [Similarly, CF&S also avoids (a) the collateral reference text authority immediately following R.I.G.L., Sec. 18-9-5 and (b) the recent decisions in other jurisdictions, *Parsons v. Walker*, 28 Ill. App. 3rd 517, 328 N.E. 2d 920 (1975) and *City of Reno v. Goldwater*, 558 P. 2d 532 Nev. (1976) (Petition 16)].

The decision below, which cited no precedent or legal authority, cannot be reconciled with either the aforementioned R.I. statute (R.I.G.L., Sec. 18-9-5) or Article 1, Section 5 of Rhode Island's own Constitution.* Simply put, the retroactive ruling below, which

*Section 5. *Entitlement to remedies for injuries and wrongs — Right to justice.* — Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one's person, property, or character. Every person ought to obtain right and justice freely, and without purchase, completely and without denial; promptly and without delay; conforably to the laws.

deprived these homeowners of access to the courts to protect their homes and their environment from misappropriation of community open land - in favor of an insensitive attorney general, who first refused to move into the breach and then, on February 13, 1989 at appellate oral argument, shifted gears and became a tellingly vigorous adversary — is not only untenable but also an outrage. Certainly, such an unjust result must not be allowed to stand in these crucial environmental times. (Petition 12, 16-17)

Rule 56 Summary Judgment was Patently Untenable

Much, if not all of the petitioners' August 11, 1989 reply to respondent R&F's treatment of this point also applies with equal force to CF&S and need not be repeated. (*Id.* 3-5) The historical facts which the respondents cannot tolerate (and the courts below ignored), are documented in the petitioners' second supplemental appendix *infra.* These include (1) Lakeside's 1912-16 acquisition with donated funds specially solicited from community members in aid of pre-existing charitable programs handicapped for lack of a permanent location (P.S.S.A. 7-8, 14-26, 22); (2) the initial charitable holder's repeated recognition of its resultant trust responsibilities (P.S.S.A. 9-10, 11-13, 14-15, 16-17, 22-26); and (3) the resultant legal/equitable duties and consequences (P.S.S.A. 27-31).

The "bottom line", which CF&S ineptly tries to obscure, is that, at best this case presents mixed question(s) of law and fact which cannot properly be decided under Rhode Island's adopted Federal Rule 56 and summary judgment law (Petitioners' reply to R&F 3-5; Petition 17-22). Some of CF&S' misguided efforts or stark omissions are:

1. An attempt to avoid the *res judicata* consequences of the R.I. Superior Court's 1951 *cy pres* decree (Petition 17-18) by claiming that Rhode Island's adopted federal law of *res judicata* and its application to fundamental/subject matter jurisdiction (Petition 9n) was not raised below (Brief 8n) when, in fact such law had been briefed and re-briefed. (P.S.S.A. 30-31 and 33-34; petition 17-18)

2. An attempt to avoid the documented, 1936 opinion of the initial charitable holder's Honorary Counsel, George H. Huddy, Jr., that the Society held title to Lakeside as trustee and was under a duty to continue to hold the property for the charitable purposes for which Lakeside "had been placed in its name"

(Petition 23), by claiming that Mr. Huddy's opinion "was not part of the record below" (Brief 28) when, in fact it is. Repeated reference to Mr. Huddy and his aforementioned opinion (which the Society heeded) may be found in Petitioners' Second Supplemental Appendix, *infra* (P.S.S.A. 11, 17, 24; see also petition 23 and P.A. 22).

3. An attempt to avoid the consequences of the petitioners' outstanding discovery demands (and the respondents resistance) by making no mention of the subject. (Petition 18-22).

4. An attempt to avoid the consequences its dogged refusal to produce (and which petitioners' outstanding discovery demands include) the very contemporaneous records which one would expect to shed light on CF&S's Lakeside title expectations, i.e. *complete*, unexpurgated (rather than 50-75% in some cases 90% deleted) copies of CF&S' 1950-51 directors' minutes (Petition 21), by making no mention of the subject.

5. A clumsy attempt. after two years silence, to explain away its repeated admissions of trust title in its initial August 1987 memorandum (Petition 20-21, P.A. 30-31, 42-44) by now asserting that CF&S had been doing nothing more than accepting as true the allegations of the petitioners initial verified complaint (Brief 25). CF&S' belated August 1989 "explanation" has a hollow ring, particularly in view of the petitioners repeated reference to this matter below to which CF&S offered nothing but silence. (Petition 20-22) E.g., plaintiffs May 19, 1988 (p. 15) and June 30, 1988 memoranda in opposition to summary judgment; plaintiffs' January 13, 1989 R.I. Supreme Court brief (pp. 3, 13; R.A. 38-40, 79-80); plaintiffs' February 28, 1989 petition for reargument (p. 10). See P.S.S.A. 30-31 and petition herein 20-22, P.A. 30-31 and 42-44. (A copy of the petitioners' initial complaint is reproduced at P.S.S.A. 36-41). On summary judgment such conflicts must, of course, be viewed in a "light most favorable to the opposing party". (Petition 22 and decisions therein cited). This is especially appropriate here in view of the witheld documents discussed immediately above in numbered paragraph 4.

Reliance on an Unpublished Non-record Attorney General's Opinion was Patently Untenable.

CF&S's ascerbic discussion of this issue (brief 26-29) canot obscure

the following facts:

1. The R.I. Attorney General and his office were not notified of the June 12, 1987 back-to-back real estate transactions among respondents CF&S, Sherry and R&F. See Paul Huling May, 19, 1988 affidavit, P.A. 18-19. Indeed, Assistant Attorney General Murray made pointed references to such non-notification at the November 10, 1987 plaintiff Eileen Naughton deposition; the transcript so shows. (P.A. 19). There is no contrary record evidence, CF&S' assertions notwithstanding.*

2. CF&S's aforementioned August 17, 1987 memorandum contained the pointed statement that the "administrative arm of the Attorney General Department responsible for the enforcement of charitable trusts has not found cause to even investigate this land transaction." (P.A. 30). CF&S repeated its statement, word-for-word in its April 26, 1988 summary judgment memorandum. (P.A. 42) Except as immediately, hereinafter stated, the record, to petitioners' knowledge, contains no contradiction

3. Thus, it was most surprising to the petitioners, at February 13, 1989 oral argument, to hear the Assistant Attorney General say that his office had made inquiry and had prepared an opinion or finding of "no fault" with CF&S' June, 1987 sale of the Lakeside property for private development. During February 13 oral argument and again in its February 23 order/decision, the court below was visibly impressed by these statements. Petitioners so noted in their February 28, 1989 petition for reargument (P.S.S.A. 34; petition 22).

4. In their February 28 reargument application, the petitioners stressed that the record contained *no* such opinion or finding and protested the court below's deference to, if not acceptance of a thus-far undocumented Attorney General opinion or finding, which the petitioners had never seen. (P.S.S.A. 34-35; petition 9-10, 22)

5. The Attorney General had an opportunity to cast light on this matter in his March 13, 1989 memorandum filed in

*Just before filing their initial complaint, petitioners advised the Attorney General and his office that he would be named as a party for the sole purpose of ensuring jurisdiction. There is no substance to CF&S' claim that petitioners requested authority to sue "as relators, in the name of the state". (Brief 26n; see Huling affidavit *supra*, P.A. 18-19)

response to the petitioners' February 28 reargument petition, but chose to make no mention of the subject. (Petition 3n, 22n). Reargument denial followed shortly (P.A. 3)

Under the foregoing circumstances, the R.I. Attorney General should have made full disclosure by promptly filing his opinion/finding and giving petitioners an opportunity to respond. If there was, in fact, no such document, this too should have been fully and promptly disclosed. Maintaining silence was manifestly unfair to the petitioners and denied them due appellate process.

CF&S' Motion for Costs

There is no more merit to CF&S' costs motion than that initially filed by respondent R&F (Petitioners' August 11, 1989 reply brief 5). The negative effects of such applications generally is well noted by Mr. Justice Stevens, concuring in *Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985).* Petitioners are content that the petition for certiorari and their reply briefs be judged on their merits.

CONCLUSION

As provided in U.S.C. Section 2106, this case should be summarily remanded for completion of the petitioners' pre-trial discovery.

Providence, Rhode Island
August 25, 1989

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PETITIONERS' SECOND SUPPLEMENTAL APPENDIX

Excerpts from Plaintiffs' Supplemental answers to Defendant's Interrogatories, verified January 24, 1988.

Plaintiffs responding further to the interrogatories of defendant Children's Friend and Service, Inc.:

1. Set forth the place and date of incorporation of "The Warwick Land Trust, Inc." setting forth the names of (a) all incorporators of the Warwick Land Trust, Inc., (b) all officers and directors of the Warwick Land Trust, Inc., (c) an itemization of all assets of Warwick Land Trust, Inc.

1. Plaintiff Warwick Land Trust was incorporated as "Friends of Warwick Pond and Hoxsie also Warwick Land Trust" at the office of the Rhode Island Department of State, Providence, on April 24, 1987. Its incorporators, officers and directors are listed in its articles and certificate of incorporation and its current brochure, copies of which are annexed *to plaintiffs' initial answers* and made a part hereof. Its financial assets presently consist of (a) approximately $1,000.00 in general purpose funds; (b) $10,000.00 appropriated by the General Assembly for special purposes; (c) a $400,000.00 grant approved by the R.I. Department of Environmental Management for special purposes; (d) a $250,000.00 loan commitment from the R.I. Heritage Preservation Commission for special purposes and (e) additional funds contributed/advanced for anticipated litigation expenses by community residents.

2. Set forth the residence address of the Plaintiffs, Paul Huling, Jeanne M. Foster, Eileen Naughton and Kathleen Preiss, and as to each such residence, set forth the distance in feet of the residence of each of said Plaintiffs from the nearest boundary of property owned by Children's Friend and Service, Inc. on Lakeshore (sic) Drive, Warwick, Rhode Island.

2. Plaintiff Paul Huling resides at 107 Fairway Lane, Warwick, approximately 300 feet from the property at issue herein. Plaintiff Jeanne M. Foster resides at 31 Lakecrest Drive on Warwick Pond, approximately 300 feet from the property at issue. Plaintiff Eileen Naughton resides at 100 Old Homestead Road, approximately 4000

Supplemental/Amended material is italicized in text.

feet from the aforesaid property. Plaintiff Kathleen Preiss resides on Lakeshore Drive, Directly abutting the property at issue.

4. Itemize all usages of the real estate formerly owned by Children's Friend and Service, Inc. located on Lakeshore Drive, Warwick, Rhode Island for the past 7 year period prior to date of the filing of the Complaint, setting forth as to each such usage (a) the owner of the land during such usage, (b) the term during which said real estate was subject to the usage in question.

* * *

(b) Between August 4, 1980 and August, 1981 when, upon information and belief, its Warwick Pond remedial programs were terminated, the defendant Children's Friend operated intermittently a shelter care program for community infants and a residential treatment center for community children. As of August 4, 1980 and continuing thereafter, Children's Friend permitted the community to use the property at issue for boating, fishing, bicycling, swimming, hiking, ice-skating, sailing, bird-watching, soccer, baseball, basketball, nature education, photography, picnicking and other community recreational purposes. Such activities date back many years to the early 1900's and have continued through the date of these answers to interrogatories, although less frequently after the purported conveyance(s) of June 12, 1987 and the subsequent stationing of a vigorous, if not dangerous, German Shepherd dog on the premises.

The property's facility house, while closed for CF&S remedial programs in or about August, 1981, was used to house a drum and bugle corps from Warwick, England in 1982.

5. Itemize the so-called recreational usage of the premises in question as alleged in Paragraph 9 of the Complaint, giving the names and addresses of all persons who participated in such usage and the dates thereof.

* * *

As indicated above, many of the persons who contributed funds to acquire the Lakeside property, did so because of their interest in summer camping, outdoor recreation and similar work for children. Indeed, for many years

thereafter, the Providence Society for Organizing Charity sponsored summer recreational care for children and the parents of children in need of outdoor life. Similarly, the community at large was permitted to use the property simultaneously for recreational purposes including those mentioned above in response to Interrogatory 4. Such recreational uses continued under the purview of Children's Friend commencing in 1951 and continuing through 1987.

It would be burdensome and indeed impossible to list the "names and addresses of all persons who participated in such usage and the dates thereof." Many, of course, are deceased. They include generations of adults and children residing on or east of Warwick Avenue and elsewhere as well as those to its west on or near Warwick Pond and the property at issue. Many R.I. community children, as Children's Friend and Family Service records should confirm, received remedial treatment and care there. They too participated in the aforementioned recreational activities along with the other community children. Among the community groups which have used this property for recreational purposes are those connected with, if not sponsored by, the Boy Scouts, Girl Scouts, (including Hoxsie Troop 517), Little League, the Warwick Recreation Department, St. Timothy's Church and the Rhode Island Audubon Society. Many other R.I. community children and adults have used the premises on a less organized basis.

Beyond defendant's own records and recollections and those of Family Service and its present and former divisions, there are other Rhode Island documents and residents which/who can confirm the longstanding recreational purposes and usage of this property. These include Warwick City Historian Donald D'Amato's (February 24, 1987 *Warwick Beacon* article, *plaintiffs' Exhibit 4 on discovery*); R.I. Audubon Society Executive Director, Alfred L. Hawkes, (annexed February 20, 1987 letter also included in plaintiffs' Notice of *Lis Pendens*, herein); the aforementioned Chester V. Foster Jr., a 25 year Warwick Pond resident who has created a documentary film on the property; and Dorothea (Bonneau) Borden, a 50 year

Warwick resident (*See her annexed 1987* letter to the *Warwick Beacon*).

Mr. Foster, who grew up in the area, recalls that he and his friends took part in fishing from the shore, playing baseball on the land adjoining the road leading to the Home and the land now occupied by St. Timothy's Church, flying model airplanes, ice skating on the small pond on the property, and other childhood activities of play such as cowboys and indians, tag, hide and seek, exploring, etc. Youngsters from his and adjoining neighborhoods played on this land, including: Tim Martin, John Martin, Mark Bloomquist, Steven Bloomquist, Ray Nelson, Roy Nelson, David Tucker, Steven Tucker, Bill Enos, Joe Miller, Kurt Taylor, Jim Duffy, Rob Goodwin, Jim Hughes, Charlie Bradbury, Mark Gourner, Carl Gourner, Steve Reynolds, Terry Reynolds, Don Whitcher, Phil Gunnion, and many others. In addition to those who played on the land there were those who used the well worn bicycle path leading from Lakecrest Drive to Lakeshore Drive. For many years the bicycle path has been used on a daily basis by school children attending St. Timothy's School.

Mr. Foster recalls no instance of anyone having been put off the land while the Lakeside Home was open. During his Junior High School days some of the older children at the Home became his friends as they rode the school bus with the other neighborhood children who attended Gorton Junior High School. Randall Holden School Principal Pauline Salvatore encouraged such neighborhood interaction. (*Beacon* article April 30, 1981)

In 1979 the Lakeside property was the home of a Little League baseball team. The Team's Roster, listing its 15 young members is *annexed to plaintiffs' initial answers.* Certainly parents and friends of team members were welcome guests to the Lakeside facility during this period.

12. Set forth all the facts upon which Plaintiffs base the allegations of Paragraph 18 of the Complaint, setting forth the name and address of every person who allegedly engaged in boating, fishing hiking, swimming, bird watching, soccer, baseball, basketball, photography, or any other recreational

purpose on the real estate owned by Children's Friend and Service, Inc. and the dates of such usage by such person, together with the name and address of the representative of Children's Friend and Service, Inc. who gave such permission to said person.

12. It would be burdensome and indeed impossible for the plaintiffs *as CF&S now seems to recognize, (c.f. CF&S's objections to the plaintiffs' document requests),* to set forth "the name and address of every person" — literally thousands — who participated in boating, fishing, bicycling, hiking, swimming, bird-watching, soccer, baseball, photography and other recreational activities on or adjacent these premises during 1951-87. Detailed references to these activities during and indeed prior to the past 36 years period have already been set forth in plaintiffs' answers to Interrogatories 4(b), 5 and 7 and, to a lesser extent, 6 and 8, to which defendant's attention is directed. Organized groups which have made recreational use of the foregoing premises have been mentioned in answer No. 5 along with the names, identity and location of long-time Warwick residents and other knowledgeable persons who can confirm such recreational use, both organized and casual.

During this entire period, Children's Friend had representatives on the premises including staff at its facility building (1951-81) as well as a property superintendent(s), who, apparently, continues to reside on the premises through the date of these answers to interrogatories. *Hundreds of children annually* receiving care at said defendant's facility and their families are known to have participated in such recreational activities along with other community members. Moreover, community service groups and volunteers, e.g. Rotary Club and Lions Club, were direct participants in programs which the defendant itself sponsored. *Other community members, including the plaintiff Eileen Naughton and her family, donated clothing for needy children.*

Pre-trial discovery of said defendant CF&S, its records and recollections is expected to provide further information and details. Such community recreational use was *an important* charitable purpose which motivated the property's original donors to make their charitable gift some 70 odd years ago. (Nos. 5, 6, 7, and 8 herein)

Providence Society for Organizing Charity (later Family Welfare Society of Providence, now Family Service, Inc.) documents appended to Plaintiffs' Supplemental Answers to Interrogatories, verified January 24, 1988.

(a) *Providence Journal* article February 29, 1912 as recopied by Providence Society (Exhibit 12 — Plaintiff Naughton November 10, 1987 deposition).

(Copied from the Providence Journal p. 5 col.5 — Thurs. 2/29/12)

PROVIDES SUMMER HOME FOR POOR
Charity Society Gets Lakeside
Sanatorium at Hoxie

FOR MOTHERS AND CHILDREN

Funds for Purpose Solicited by Subscription, Making it Possible to Get Property Without Interfering with Regular Work of Society for Organizing Charity. -- 57 Contributors.

The Lakeside Sanatorium at Hoxsie on the west shore of Providence River in the Town of Warwick, originally known as the Parker Institute for Physical Training, has been acquired by the Providence Society for Organizing Charity for the purpose of providing summer outings for poor mothers and children.

Negotiations for the transfer of the property were concluded yesterday. The large structure will be used as a place where mothers and small children may rest and recuperate in the summer months.

The property was purchased from Pryce Owen of this city, and was made possible by the efforts of a special committee composed of James A. Kinghorn, Chairman; Dr. Jay Perkins, Henry D. Sharpe, Mrs. John Tempest Walker, Francis M. Smith, and Barry Cutler. This committee solicited funds by subscription and made it possible to get the property without interfering with the regular work of the Society.

The structure is admirably adapted in every way for the

purpose of the society. Mr. Williams was highly pleased at the success of the society through its committee. He expressed the opinion that it is the beginning of a permanent home for convalescent work. There were 57 contributors to the fund which in the aggregate amounted to $10,000. The purchase price was not made public but Mr. Williams said that it was very reasonable.

NAMED LAKESIDE HOME

The new place has been named the Lakeside Home and will be opened the latter part of May. It is not the intention of the Society to treat any communicable disease at the home. In speaking of the work, Mr. Williams said: "For three years during the summer months the Society for Organizing Charity has carried on outing work, primarily for children, and we have always had to rent for this purpose property often not very accessible to the city. Last summer we extended the work to include some mothers. We now wish to secure a definite location, where eventually we will be able to carry on the work all the year round, and not only provide summer outing, but also convalescent care for mothers who are convalescing from confinement and who must often do the work of the home too soon, and in consequence the health of both mother and baby is impaired; for working women who are often compelled to go beyond their strength in order to provide for their families, and for working girls who, while not hospital cases, need a period of rest and recuperation in order to prevent serious sicknesses.

"We also wish to provide extended care for delicate children suffering from mal-nutrition and general neglect, often due to the ignorance of the mother. Such children either contract tuberculosis or becomes the cripples of our community if proper care is not given during childhood, and we hope to have arrangements for at least 50 such children in this home during the summer months.

EDUCATIONAL INFLUENCE

"While the prime object of the work will be to care for the class of persons enumerated above, we believe that the direct educational influence will bring on the whole the very best results. It will give the nurse in charge an

opportunity to teach the mother how to take care of her home and her children."

The Lakeside Home is situated on the west side of the tracks of the Buttonwoods line south of the Hoxsie station, overlooking the bay in the distance from the large broad veranda, with a fresh water lake in the rear. The house contains 26 large rooms radiating from two spacious halls, and it is surrounded on two sides by a wide piazza. It was built in 1897, and is of pleasing architectural design.

The property includes 16 acres of level land and is equipped with golf links, tennis and hand ball courts. The lake affords fishing and swimming, as does the salt water close by. The ride from the city takes but 30 minutes.

Every room is adequately equipped with modern conveniences for the purpose to which it will be used.

(b) Excerpt from "Summer Outings" and Appendix, *circa* December, 1935 (App. pages 10-11).

Tuberculosis Committee	*Outing Committee*
Charles A. Catlin	Henry D. Sharpe
Frederick Rueckert	James A. Kinghorn
Charles A. Russell	Henry Dunnell
James A. Kinghorn	Mrs. John Tempest Walker
Rev. A. M. Lord	Mrs. William McDonald
James B. Williams	

24. *Executive Committee* 11/24/13 (par. 6) "The League's request for "permission to use Lakeside Home for preventorium work during the winter was granted until such time as property was required for the regular work."

25. *Executive Committee* 3/13/16 (par. 7) Mr. Sharpe announced purchase of additional property and its addition to Lakeside Home and deeded to Society.

26. *Board of Directors* 2/12/19 (last par p. 2) "Dr. Perkins reported on meeting held to consider plans for raising money for Lakeside. He said that Mr. Henius had suggested transferring Lakeside to a committee composed of representatives of all agencies interested in outing work.

"Voted, that this question be referred to Executive Committee."

27. *Executive Committee* 2/27/19 (par. 5) "Voted that financing and running of Lakeside be entrusted to the recently appointed committee which shall have power to add to its members — the members are Dr. Perkins, Mr. Henius, Mr. Kinghorn, Mr. Sharpe, MR. E. Tudor Gross, Mr. Charles A. Russell, Mrs. Walter Peck, Mr. E. B. Hough, and Mr. James Cheesman."

"Secretary instructed to obtain telephone vote of absent members of the Executive Committee on this subject."

(Note: - Mr. Cheeseman was the only member of this Committee who was not a member of the Board of Directors of the Society.)

28. *Board of Directors* Report of Committee appointed at Board Meeting of January 21, 1920

*28a See letter to Mr. Sharpe under date of Jan. 29, 1920 from Mr. Huddy. (inserted after Appendix)

February 18, 1920

Mr. A. M. Coats, President
Providence Society for Organizing Charity
Providence, R.I.

Dear Mr. Coats:-

The Committee of the Board appointed at the last meeting of the Directors to confer with the committee of those interested in the prevention and suppression of tuberculosis relative to a separation from this Society of the work in which they are engaged, begs to make the following report.

Understanding that the wish to separate from this Society and form a new organization called the Providence Tuberculosis League, is proposed following their plan to have reorganization and enlargement of the work, we recommend that this Society cooperate with them by sanctioning the separation and also in the leasing to them of the Lakeside Home with its equipment under such terms as are appropriate

in view of our Society being in position of a trustee for the use of the Home for those purposes for which the property has been placed in our care.

While the committee was appointed with power to make arrangements, a perusal of the by-law under which the real estate is held in trust by us makes us of the opinion that the proper way in which to proceed is to have the action definitely approved by the Board and later such action to have the written approval of the several real estate managers. Accordingly, after consultation with the Mssrs. Perkins, Kinghorn and Rueckert, the * have prepared a form of lease for the real estate which is submitted herewith; we recommend it for approval by the Board and authorization for its signature on behalf of the Society. The lease has been drawn up and generally approved by our counsel, Mr. George H. Huddy.

As to the equipment of the Home, we would recommend that its lease to the new organization be arranged after a proper inventory of same is made, the lessee to pay a nominal rent and to be generally responsible for careful usage and replacement, allowance being made for wear and tear.

Respectfully submitted,

(Signed) Henry D. Sharpe
Philip B. Simonds
P. H. Gardner

*Committee of the League

2/18/20 "The President read the report of the Committee appointed to consider leasing the Society's property at Lakeside to the Tuberculosis Association. Mr. Sharpe read the proposed lease of the property at Lakeside. Upon motion by Mr. Sharpe, seconded by Judge Rueckert, it was voted that the officers of the Providence Society for Organizing Charity be and are hereby authorized to sign the lease as presented. (and the separation of the two societies is agreed to).

(c) Memorandum re conversation with Honorary Counsel George H. Huddy, Esq., January 18, 1936.

Memo

(Based on conversation with Mr. George H. Huddy, Honorary Counsel of the Family Welfare Society. Mr. Huddy has gone over this material.)

On January 18th, 1928, Mr. Huddy stated that he had gone over the narrative report showing the history of Lakeside but that he would like to study the material further before submitting a written report. However, his tentative reaction is that the summer outing program was developed by the Society as a distinct function over a long period of years, that the money to purchase Lakeside was raised for the purpose of conducting such a program; and that the Society had an obligation to maintain a summer outing program; that the program the Tuberculosis League was carrying on at Lakeside was a matter of convenience to the League.

Mr. Huddy felt that, assuming that both the summer outing program of the Family Welfare society and the Tuberculosis League's work can be carried on conveniently at Lakeside that some arrangement could be worked out whereby both the programs could be continued at Lakeside.

Mr. Huddy thought that an arrangement might be entered into between the Society and the League whereby any buildings erected by the League might be completely owned by them and disposed of when they no longer were useful to the League and in that way they would be re-imbursed for whatever investment they made in the buildings. Or, a long time lease giving the Tuberculosis League sufficient time to amortize the buildings they might put on the land could be arranged.

Mr. Huddy thought that in view of the conditions under which property was purchased, the Family Welfare Society was obligated to continue to hold title as trustee for those purposes for which the property has been placed in its name.

Summer outing work is not necessarily tied to Lakeside if the Family Welfare Society decides there is a better

location but wherever it is located the summer outing work should have the benefit of the values that are represented in Lakeside.

(d) Memorandum re Lakeside Property, Charles P. Sisson, Esq., December 11, 1946.

Memorandum: Re - Lakeside Property

The President of our society has conferred several times with Dr. Pinckney and Mr. Brown. Our General Secretary has also conferred with Dr. Pinckney and with Mr. Loosley of the Community Fund. The members of our board are fairly familiar with Dr. Pinckney's previously expressed desire that our society would convey the property to his organization. The doctor has been advised definitely that we will not do this. He has now suggested the possibility of the property being used as a Children's Hospital Center with a number of children's organizations uniting to use and improve the property for this purpose.

Mr. Brown has conferred with Mr. Loosley in regard to this suggestion and Mr. Loosley feels that if we are willing to defer final action for a few months that Dr. Pinckney's latest suggestion should be considered, studied and explored by the Community Fund.

To encourage this study, it has been proposed that we commit the Family Welfare Society of Providence to as definite a course of action as the following:

a. The proposed use of the property is approved by the Community Fund.

b. The proposed use shall have taken definite form and shall be reasonably consistent with the intent of those who provided the funds by which the property was acquired by our society.

c. The project shall be in form for our study not later than June 1, 1947.

Action by the Board of Directors of the Family Welfare Society of Providence on the substance of this memorandum will be an order of the business at the board meeting on December 18, 1946.

(Signed) Charles P. Sisson, President
Family Welfare Society of Providence

(e) Letter from Richard M. Brown to Dr. John I. Pinckney, December 26, 1946.

December 26, 1946

Dr. John I. Pinckney, Executive Secretary
Providence Tuberculosis League
100 North Main Street
Providence 3, R.I.

Dear Dr. Pinckney:

At the suggestion of Mr. Charles P. Sisson, President, Family Welfare Society, I am writing to acquaint you with the action taken by the Board of Directors of the Society with relation to the Lakeside property. The following recommendation was unanimously approved in a meeting of our Board held December 18, 1946:

"That the Family Welfare Society of Providence will deed the Lakeside property to a Children's Hospital Center or organization, provided:

a. The proposed use of the property is approved by the Community Fund.

b. The proposed use shall have taken definite form and shall be reasonably consistent with the intent of those who provided the funds by which the property was acquired by our Society.

c. The project shall be in form for our study not later than July 1, 1947."

I sincerely hope that the above action will prove satisfactory to you and others interested in developing a health project for children and that during the course of the next several months your planning together will begin to take shape.

Sincerely yours,
Richard M. Brown
General Secretary

Excerpts from Plaintiffs' Verified Amended Complaint — Class Action, verified March 30, 1988.

Background

14. The property at issue was given and has been used for recreational, remedial and other community charitable purposes for more than seventy years, as best described and understood against the following background.

15. The Providence Society for Organizing Charity (subsequently Family Welfare Society of Providence and now Family Service, Inc.) was created by an act of the Rhode Island General Assembly at the January, 1898 session. The Society's corporate purpose, as stated in its charter, was "organizing charitable work, diminishing pauperism and improving the condition of the poor."

16. Commencing in or about 1902, some ten years prior to the gift of the initial parcel in 1912, the Providence Society for Organizing Charity, its divisions and committees, had been conducting summer outing programs for community children. Commencing in or about 1905, the Society and its Committee on Tuberculosis (later separately incorporated as the Providence Tuberculosis League) began investigating and conducting activities to prevent tuberculosis. These programs were (a) devoted to community children but (b) handicapped by the lack of a permanent location controlled by the Society.

17. By vote of the Society's board of directors, October 17, 1911, a committee was appointed to "look over" the proposition of acquiring property "for a permanent summer outing place and convalescent home." The aforementioned committee reported to the Society's board on December 20, 1911 that after considering many locations for outing work as well as a convalescent home, the Lakeside Sanatorium at Hoxsie was most desirable. A second Society board committee was then appointed to acquire the property for the foregoing purposes provided sufficient monies could be raised "without public appeal for funds."

18. Fifty-seven community members responded to the Society's solicitation and contributed roundly $10,000, the sum required to obtain the aforementioned Lakeside (Warwick Pond) property. The Society's board was so informed on February 23, 1912. With February 23, 1912 board approval, title was

temporarily taken in the name of Brown University's then president, William H. P. Faunce, as trustee.

19. Public announcement of the Society's acquisition, through subscription funds, was made by February 29, 1912 *Providence Journal* article. References to (a) the efforts of the foregoing committee, (b) fifty-seven contributions and (c) the beneficial summer outing and convalescent care purposes were also made therein. Outdoor recreation and convalescent care programs formally commenced at Lakeside on or about June 17, 1912.

20. Meanwhile, at the aforementioned February 23, 1912 Society board meeting and a subsequent March 5, 1912 executive committee meeting, consideration was given as to how title and control of the Lakeside property might be held and administered "for the purpose for which the money was contributed." Thereafter, at the Society's annual meeting, October 25, 1912, the by-laws were amended to create a Board of Real Estate Managers who would have "management and control" of the Society's real estate, i.e. Lakeside. The initial managers elected were Preston H. Gardner, George H. Huddy, Jr., Esq., Charles A. Catlin, Samuel H. Tingley and Henry D. Sharpe.

21. Dr. Faunce thereupon formally deeded the Lakeside property to the Society on or about October 31, 1912. Additional adjoining property was similarly acquired as Mr. Sharpe informed the Society's executive committee on March 23, 1916.

22. The Lakeside (Warwick Pond) summer outing program of the Providence Society for Organizing Charity, accommodating 500-600 community women and children and the convalescent program of the Society's aforementioned Committee on Tuberculosis, accommodating 60-170 children, continued until 1920.

23. By report to the Society's board dated February 18, 1920, a committee of Messrs. Sharpe, Gardner and Philip B. Simonds recommended that the Society lease the premises to the recently incorporated Providence Tuberculosis League "under such terms as are appropriate in view of our Society being in the position of a trustee for purposes for which the property has been placed in our care." The proposed lease was thereupon executed as were subsequent renewals thereof.

24. The Society's summer outing work continued during the 1920-28 period accommodating about 500 women and children

each summer during those years along with the tuberculosis League's remedial programs.

25. The foregoing remedial activities and to a lesser extent, the aforementioned summer outing work continued through 1934. Thereafter, during the ensuing fifteen years, until about 1950, the Tuberculosis League continued to conduct, with community support and assistance, remedial and residential programs for community children at Lakeside.

26. As indicated above, many of the persons who contributed funds to acquire the Lakeside property and, in subsequent years to support the Society's and the League's programs, did so because of their interest in summer camping, outdoor recreation and similar work for children. For many years the Society with cooperation and support from the League, sponsored summer recreational care for both children and the parents of children in need of outdoor life. Similarly, during the 1912-50 period, the community at large was permitted to use the property simultaneously for boating, fishing, swimming, hiking, ice-skating, sailing, bird-watching, nature education, photography, picnicking and other community recreational purposes.

Fiduciary Recognition

27. Commencing with its acquisition of the initial 1912 parcel with funds solicited and received from community members for the purposes of aiding and promoting its community charitable work and continuing for almost forty years thereafter, the Providence Society for Organizing Charity recognized its concomitant fiduciary responsibilities. Such recognition is confirmed by (a) the foregoing allegations in paragraphs 2, 14-26 above and (b) documented contemporaneous statements by Society board members including, among others:

(a) The "general sentiment" of the Society's executive committee at a March 12, 1912 meeting (paragraph 20 above) that the property should be "vested in a Board of five trustees to be administered by them and under an indenture for the purpose for which the money was contributed and in harmony with this Society."

(b) The Society's subsequent October, 1912 annual meeting action (paragraph 20) amending its by-laws and

placing the property under the "management and control" of a newly authorized five member Board of Real Estate Managers including Henry D. Sharpe, Preston H. Gardner and George H. Huddy, Jr., Esq.

(c) The written February 18, 1920 report of a Society board committee, signed by Messrs. Sharpe, Gardner and Phillip B. Simonds, (paragraph 23) advising that the Tuberculosis League lease should contain "terms as are appropriate in view of our Society being in a position of a trustee for the use of the home for those purposes for which the property has been placed in our care."

(d) A prior January 29, 1920 letter from the Society's counsel, the aforementioned Mr. Huddy (Huddy, Emerson & Moulton), to Mr. Sharpe that the proposed lease contain a covenant that the League would "carry on in the use of the demised premises, the proposed charitable work to the satisfaction of the Society..."

(e) The actual provision contained in 1920 and 1926 leases mandating that the League would use the premises "solely for the carrying on of its charitable work in connection with the prevention of tuberculosis and the carrying on of the summer outing work heretofore administered by the [Society]..."

(f) The documented January 18, 1936 statement by Mr. Huddy, then Honorary Counsel of the Society, that "in view of the conditions under which [the Lakeside] property was purchased the ... Society was obligated to continue to hold title as trustee for those purposes for which the property was placed in its name."

(g) A unanimous Society board resolution, adopted December 18, 1946 upon written recommendation of its president, Charles P. Sisson (former Rhode Island Attorney General) that the Society would deed the Lakeside property to the Children's Hospital Center, provided the "proposed use shall have taken definite form and shall be reasonably consistent with the intent of those who provided the funds by which the property was acquired by our Society."

1951-1987 Period

35. During the ensuing thirty years, CF&S, with community assistance and support, provided emergency and shelter care for needy children at the Lakeside (Warwick Pond) property. During the years 1955-68 the number of children receiving such care appears to have ranged from 200-400 annually. Food, clothing, medicine, child care and "substitute parenting" were also provided. Commencing in or about July, 1969 the program's focus changed to a residential treatment program for emotionally disturbed children. In 1981, the CF&S Warwick Pond/Lakeside remedial programs were terminated.

36. During the 1951-81 period, in keeping with the initial donors' charitable purposes and the uses mentioned in paragraph 26, CF&S permitted the community at large to use the property at issue for boating, fishing, bicycling, swimming, hiking, ice-skating, sailing, bird-watching, soccer, baseball, basketball, nature education, photography, picnicking and other community recreational purposes. Such activities continued after the 1981 closing of the property's facility house although less frequently after the purported conveyance(s) of June 12, 1987 and the subsequent stationing of a vigorous German Shepherd on the premises.

37. Among the community groups which have used the property for recreational purposes during the past thirty-five years are those connected with, if not sponsored by, the Boy Scouts, Girl Scouts, (including Hoxie Troop 517), Little League, the Warwick Recreational Department, St. Timothy's Church and the Rhode Island Audubon Society. Many other community children and adults have used the premises on a less organized basis. During the 1951-81 period CF&S and community officials encouraged interaction and friendship among Lakeside home residents and other neighborhood children. Adult community members, including the Lions Club and Rotary volunteers, donated time, money and clothing in support of CF&S' Lakeside/Warwick Pond programs.

Excerpt from Plaintiffs' May 19, 1988 Memorandum in Opposition to Defendant's Motion for Summary Judgment.

Plaintiffs' Right to Proceed

Through this suit the plaintiffs seek to prevent serious, monetary, recreational and environmental damage to their homes and their neighborhood which, as confirmed by expert opinion, will surely happen if this charitable, recreational, primarily open land is misappropriated for private development and exploitation. (Amended verified complaint, pars. 2, 26, 26, 29, 35-37, 43, 63-64, and 73-77 and annexed table sources; plaintiffs' supplemental answers to CF&S interrogatories, pars. 4(b), 5, 12, 13 (p. 23), 18 and 28; Huling affidavit, pp. 6-7)

All individual plaintiffs are Warwick residents and own homes on or near Warwick Pond and the Lakeside property. Plaintiff Warwick Land Trust is a non-profit R.I. corporation with a registered office at 31 Lakecrest Drive . As residents on or near Warwick Pond they have a special interest in this suit. Their personal and class action claims, particularly those for environmental damage satisfy Rule 23 requirements and have special legislative and other distinguished support (Amended verified complaint pars. 4-5, 37, 63-64, and 73-78 and annexed table sources; plaintiffs' supplemental answers to CF&S interrogatories, par. 18; Huling affidavit, pp. 1, 6-7 and annexed Audubon Society letter; Rule 23, R.I. Rules of Civil Procedure; R.I. Gen. Laws, Sections 10-20-1 and 10-20-10; *Johnston's Businessmen's Association* v. *aaRussillo*, 108 R.I. 257, 274 A.2d 433 (1971); unanimous special session land use legislation adopted by the General Assembly in September 1987 and the overwhelming support of the R.I. electorate on November 3, 1987)

In keeping with *Berberian* v. *Solomon* 122 R.I. 259, 405 A.2d 1178 (1979) (CF&S memorandum, p. 25), the plaintiffs have made the requisite allegations from which standing may be inferred, i.e. their own "injury in fact" and their own "personal stake" in this controversy. With one corporate exception, all are tax paying owners of homes on or near Warwick Pond and one plaintiff's property abuts the Lakeside acreage. (Amended verified complaint pars. 4-5; supplemental answers to interrogatories, Nos. 2 and 18.)

CF&S does not mention plaintiffs' verified statement that

homes on or near Warwick Pond (to the west of Warwick Avenue) would lose at least 10% of their market value should defendants ever proceed with their intended development. [Supplemental answers to CF&S interrogatories, No. 18 (p. 30)]. Indeed, the value of adjacent open land to neighboring residences has been confirmed by recognized experts including Alfred L. Hawkes, executive director of the Audubon Society of Rhode Island and Richard C. Youngken, East Greenwich Town Planner. (Huling affidavit and annexed October 29, 1987 *Pendulum* article.) Following similar arguments last August 24, 1987 the Court (Bulman, J.) overruled CF&S contentions and found that the plaintiffs had sufficiently demonstrated their right to proceed and "get their licks in." *Cf., partial* transcript annexed to CF&S' present papers. That ruling should not now be "disturbed". Cf., *Salvatore* v. *Major Electric & Supply, Inc.* A.2d 353 at 355-56 (R.I. 1983). CF&S Memorandum p. 11.

The plaintiffs' subsequent prosecution of this case has been most diligent as a review of the Court's docket and files will readily confirm. Their impressive historical research, conducted by the individual plaintiffs themselves, is reflected in their January 24, 1988 supplemental answers to interrogatories and their March 31, 1988 amended verified complaint. Several hundred persons have responded to their litigation fund raising appeals and more such events are being planned. (Huling affidavit; supplemental answer to interrogatories, No. 28) Judge Bulman made no mistake recognizing plaintiffs' right to proceed.

Even assuming, their homes proximity to Warwick Pond and the Lakeside property notwithstanding, that the plaintiffs have not demonstrated injury distinct from the public in general, which is denied, their amended verified complaint (like their initial complaint) presents urgent issues which may be rendered moot if the plaintiffs are not allowed to proceed. Substantial community support notwithstanding, no R.I. governmental agency or department (or anyone else) has offered to carry on this litigation to protect this environmentally unique property [Supplemental answer to interrogatory 18 and annexed Audubon Society (Hawkes) letter; Huling affidavit.] This is, therefore, the precise situation which allows designated plaintiffs to proceed even without allegations of

personal injury. *Sennott* v. *Hawksley,* 103 R.I. 730, 241 A.2d 286 (1986) and discussion contained in *Berberian, supra* at 1180-81 and *Blackstone Valley Chamber of Commerce* v. *Public Utilities Commission,* 452 A.2d 931 at 932-33 (R.I. 1982).

Certainly, the Attorney General's failure to commence this or any similar action is no bar. Indeed, the plaintiffs themselves joined the Attorney General as a party — in his representative capacity — for the express purpose of ensuring that complete relief may be granted. (Initial complaint, par. 7; amended verified complaint, par. 11) Having been made a party, the Attorney General and his office has been given every opportunity to participate in this case and thus ensure that the public's rights are fully protected. This is all that the Rhode Island decisions cited by the defendant require. See, especially, *Powers* v. *Home for the Aged Women,* 55 R.I. 1987 at 192, (1935) and *Newport Hospital* v. *Harvey,* 47 R.I. 382 at 383, 133 A 648 (1926).

Such has long been the general rule. As stated in *Annot.,* 62 *A.L.R.* 881, 885-86, ("Who may maintain suit or proceedings to enforce or administer benevolent or charitable trust."), the primary commentary to which, the one cited by CF&S (p. 8), is but a supplement:

> "Some cases, at least in the language of the opinion, appear to support the proposition that the attorney general is the only person entitled to maintain a suit to enforce or administer a charitable or benevolent trust. But this is not the general rule, as there are numerous cases set out elsewhere in the annotation in which the action has been held maintainable by other parties than the attorney general; and it seems to be sufficient if the latter is a party to a suit to enforce or administer the trust, either as plaintiff or defendant, for in either event the interests of the public at large, or of the indefinite class of the public who constitute the beneficiaries, are represented and protected."

Excerpts from Plaintiffs' Brief to Rhode Island Supreme Court (No. 88-0426), filed January 13, 1989.

Statement of Facts

The following facts are supported by substantial if not uncontradicted evidence:

The Providence Society for Organizing Charity ("Society") began conducting community oriented recreational and remedial programs around the turn of the century. These programs had been handicapped by the lack of a permanent location controlled by the Society. (Plaintiffs' supplemental answers to interrogatories verified January 25, 1988, No. 5, pp. 4-5 and appended documents cited therein).

By vote of the Society's board of directors, October 17, 1911, a committee was appointed to find a site "for a permanent summer visiting place and convalescent home." Two months later in December, 1911, the committee reported that the Lakeside Sanatorium at Hoxsie had been found most desirable. (Plaintiffs' supplemental answers *supra* No. 5 at p. 5).

A second Society committee, also including the late Henry D. Sharpe, was appointed to raise the necessary money. Fifty seven community members responded to the Society's solicitation and donated around $10,000.00 to acquire the Lakeside property. With February, 1912 board approval title was temporarily held in the name of the Society's president (and Brown University's) W.H.P. Faunce, as trustee. A public announcement of the Society's acquisition was made through *Providence Journal* article on February 29, 1912:

"SUMMER HOME FOR THE POOR

Charity Society Gets Lakeside Sanitorium at Hoxsie

FOR MOTHERS AND CHILDREN

Funds for Purpose Solicited by Subscription Making it Possible to Get Property Without Interferring with Regular Work of Society for Organizing Charity – 57 Contributors."

[Plaintiffs' supplemental answers, *supra* No. 5 at pp. 5-6; Paul Huling affidavit, sworn to May 19, 1988 p. 5. (R.A. 10-11, 90).]

The Society recognized its resultant fiduciary obligations from the very beginning. Two weeks after the Society's public

announcement, at a March 12, 1912 executive committee meeting, it was:

> "...voted that it was the general sentiment of the committee that the property be vested in a Board of five trustees to be administered by them and under an indenture for the purpose for which the money was contributed and in harmony with this Society."
> (Plaintiffs' supplemental answers *supra*, No. 13, p. 19.)

The Society's trust acknowledgement took ultimate form through amendment to its by-laws at the October 25, 1912 annual meeting. The by-law amendment placed the 1912 initial Lakeside property (and, by its terms, the similarly acquired 1916 adjoining parcel) under the "management and control" of a newly constituted five member Board of Real Estate Managers, including Mr. Sharpe, Preston H. Gardner and George H. Huddy, Jr., Esq. Only after the annual meeting and by-law amendment did Dr. Faunce deed over the Lakeside parcel which he had been holding as trustee. The trust purpose of the newly constituted Board is also confirmed by the 1920 report of another Society committee (including Messrs. Sharpe and Gardner) referring to "our Society being in a position of a trustee for the use of the Home for those purposes for which the property has been placed in our care" and "the by-law under which the real estate is held in trust by us..." (Plaintiffs' supplemental answers, *supra* No. 5 at pp. 6-8, No. 6 at p. 12; see R.A. 12-13).

The Society also recognized its trust title and fiduciary duties in its 1920 and 1926 leases of the Lakeside property to the Providence Tuberculosis League, a former Society division, by then separately incorporated. Indeed, the 1920 Sharpe/Gardner committee admonished that such leasing must be "under such terms as are appropriate in view of our Society being in position of a trustee..." and "have the written approval of the several real estate managers." Both leases provided that the premises be used solely for charitable work to the Society's satisfaction. (Plaintiffs' supplemental answers, *supra* No. 5 at pp. 7-8).

In 1935 the Tuberculosis League requested that it be deeded the Lakeside property. In response the Society prepared a 24 page memorandum and appendix summarizing the Lakeside

history. [A copy, entitled "Summer Outings" and "Appendix", is annexed as Exhibits 6-7 to the plaintiffs' supplemental answers *supra*.] The foregoing report was submitted to Mr. Huddy, by then Honorary Counsel of the Society. Mr. Huddy's response was:

> "...that in view of the conditions under which [the Lakeside] property was purchased, the ... Society was obligated to continue to hold title as trustee for those purposes for which the property has been placed in its name." (R.A. 14-15).

The Society, heeding Mr. Huddy's counsel, decided not to transfer title to the League but to renew its lease for ten more years. (Huling affidavit, *supra* pp. 5-6; plaintiffs' supplemental answers *supra;* R.A. 90-91)

In December 1946, the Society again recognized its fiduciary obligations regarding Lakeside, this time in response to a suggestion that the property be deeded to a children's hospital center. Upon written recommendation of its president, former R.I. Attorney General Charles P. Sisson, the Society responded affirmatively, provided the "proposed use shall have taken definite form and shall be reasonably consistent with the intent of those who provided the funds by which the property was acquired by our society." (Plaintiffs' supplemental answers *supra,* No. 13 at page 20; R.A. 16-17).

During 1946-51, the Society, the Tuberculosis League and other social agencies, including the Providence Council of Social Agencies and CF&S, considered Lakeside's future. In particular, the Society (now known as Family Service, Inc.) its Board of Directors and its Board of Real Estate Managers, carefully considered the "best use" to be made of the Lakeside real property "having regard to the welfare of the community generally and the carrying out, as near as may be, of the charitable purposes which impelled the contributors above mentioned to bring about the conveyance thereof to [the Society]..." (Plaintiffs' supplemental answers, *supra* No. 8; Family Service's February 1951 *cy pres* petition, pars. 5-6, R.A. 21-22).

All of the above agencies, subject to obtaining Superior Court authority, approved Lakeside's transfer to CF&S. They did so because CF&S for many years had been carrying out work with children in Rhode Island and would now administer and

conduct such programs at Lakeside, including programs similar to those conducted under the Society's aegis. (Plaintiffs' supplemental answers *supra*, Nos. 8 and 10; R.A. 21-22, 75-76).

Concurrently, the R.I. General Assembly was pursuaded to amend the CF&S articles of association to empower CF&F to "take and *hold* ... real estate". (Emphasis added) The proposed amendment contained the specific recital and representation that CF&S was organized and operated "exclusively for charitable purposes..." (Plaintiffs' supplemental answers, *supra*, No. 9; R.A. 18).

In February 1951, upon notice to the Attorney General "representing the people of the State and the public generally and ... with general oversight of the administration of charitable trusts," the Society petitioned the Superior Court for *cy pres* ("as near as may be") authority to convey the Lakeside property to a successor charity, CF&S. (R.A. 19-23). In reliance upon the representations contained therein, the R.I. Attorney General (William E. Powers) filed a response which effectively consented to the requested relief. (Plaintiffs' supplemental answers, *supra* Nos. 10 and 11; R.A. 24-25).

The Superior Court accepted jurisdiction and "on the bill, answer and proof" entered its February 16, 1951 decree (Walsh, P.J.) authorizing conveyance to CF&S (R.A. 26). [Pursuant to subsequent 1951 *cy pres* decree, *Providence Tuberculosis League v. Powers Providence Co.*, Eq. No: 21655, May 29, 1951, transfer of the League's personalty and endowment fund to CF&S was authorized. Years later, pursuant to a third Superior Court *cy pres* proceeding, CF&S received additional trust funds for Lakeside programs, *R.I. Hospital Trust v. Israel* 119 R.I. 298, 377 A2d 341. 343 (1977).]

The Superior Court's February 16, 1951 *cy pres* decree provided:

> "This cause came on to be heard on the bill, answer, and proof and it appearing that conveyance to Children's Friend and Service of the real estate described in the bill of complaint will permit the continued carrying out of the charitable purposes for which said real estate has heretofore been held and used by Family Service, Inc., and is also consistent with the intentions of the persons who caused the conveyance of said real estate to Family

> Service, Inc. the complainant is hereby authorized to execute and deliver a deed or deeds conveying said real estate to Children's Friend and Service, to be held for its general uses and purposes."
>
> (R.A. 26).

The subsequent April 1951 recorded deed transferring the Lakeside property, without monetary payment*, from the Society to CF&S, both identified therein as charitable corporations, specifically provided that the Society's transfer was:

> "...pursuant to authority in it vested by decree of the Superior Court of the County of Providence and State of Rhode Island entered February 16, 1951 in the case entitled *'Family Service, Inc. v. William E. Powers*, Attorney General of the State of Rhode Island, Eq. No. 21550..."

and that the property was:

> "...to be held by said Children's Friend and Service for its general uses and purposes."
>
> (R.A. 27-30).

From 1951 through 1981, when its Lakeside remedial programs were terminated, CF&S, with community and financial support, provided emergency and shelter care for needy children. During the same thirty year period, as the Society had previously allowed during its tenure, CF&S also permitted the community at large to use the property for a variety of recreational purposes. Indeed such community use continued through June, 1987. (Plaintiffs' supplemental answers, *supra*, Nos. 4, 5 and 12, at p. 4-6, 9-11 and 17-18; Huling affidavit, *supra*, p. 7; R.A. 92-95).

Nevertheless, without notice to the Attorney General and without seeking Superior Court authority, CF&S decided to transfer Lakeside to real estate developers, i.e. the challenged transfers of June 12, 1987 to defendants Sherry and R & F Associates. (Plaintiffs' supplemental answers *supra*, Nos. 13-18 and 25; plaintiffs' verified amended complaint pars. 38-53; Huling affidavit, *supra*, pp. 3-4; R.A. 88-89).

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*R & F's Rule 16 (h) statement that CF&S *purchased* the land is erroneous, as the deed itself confirms. (R.A. 28).

Point I

The Decision Should Be Reversed

The "trust property" phrase in the codified R.I. *cy pres* statute (R.I.G.L. Section 18-4-1) refers not to an express trust, as the defendants' argued below, but rather to "property held upon charitable trust." *City of Providence v. Payne,* 47 R.I. 444, 455, 133 A. 621 (1926).

A charitable trust is not governed by the technical requirements and characteristics of other trusts. Such words as "trust" and "trustee" are not required. The only requirements for *cy pres* jurisdiction are general charitable intent and public utility purpose. For more than one hundred years such charitable gifts have been highly favored and, whenever possible, supported by R.I. courts. Inquiry as to charitable intent and public purpose is broad, is not limited to bare deeds or testamentary language and includes extrinsic evidence. If such inquiry reveals a "gift ... for the purpose and not the person" and if the purpose is that of "[unstained] public usefulness", its charitable character "insures its validity." *Pel v. Mercer* 14 R.I. 412, 435-36, 438 (1884). *R.I. Hospital Trust v. Benedict* 41 R.I. 143, 147-48, 150, 103 A. 962 (1918). *South Kingstown v. Wakefield Trust Co.* 48 R.I. 27, 30 134 A. 815 (1926). *R.I. Hospital Trust v. Williams* 50 R.I. 385, 388, 390-91, 393, 148 A. 189 (1929). *Thomas v. General Board of the Church of the Nazarene* 76 R.I. 197, 68 A.2d 44 (1949). 15 *Am Jur* 2d *Charities,* Sections 5-6, (1976).

When an organization solicits and receives funds to acquire real property for public charitable purposes, as the Providence Society for Organizing Charity did to acquire the Lakeside property, it holds title as trustee and cannot divert the property to any use other than public charity. *Samuels v. Attorney General* 370 N.E. 2d 698 (Mass. 1977). *O'Brien v. Hospital Association* 96 O.S.1, 116 N.E. 975 (Ohio, 1917). *Niles Post v. Memorial Hospital Association* 65 Ohio App. 238, 29 N.E. 2d 631 (Ohio 1936). R.I.G.L., Section 5-53-5.

As stated in *Samuels, supra* at pages 700-701:

> "The statement of purpose in the 1922 convention vote to establish the Fund was an express commitment of the Fund to the purposes set out. The commitment is not less binding if an express trust was not created ... Once money

> or other property was given to the Fund for the stated purpose, use of the property was confined to the particular purpose for which the money or other property was given, and could not be diverted to other purposes by a subsequent amendment of the vote. (Citations omitted.)"

Similary in *O'Brien, supra* at page 7:

> "Where private property is temporarily used exclusively for purposes of public charity, it may be withdrawn from such use at any time at the will of the owner, but that cannot be done with the property in question. It was purchased with trust funds donated for the purposes of a public charity hospital, and is impressed with that trust. It cannot be withdrawn from the uses of this trust at the will of the trustee, or of any or all of the donors of the fund. ...The title to this property is in this corporation only as a trustee for the purposes of this trust, and it cannot divert it to any use other than public charity."

The foregoing duties are also reflected in the terms and underlying policy of R.I.G.L., Section 5-31-1 *et seq* and similar statutes of more than thirty other states regulating charitable solicitation. E. Fisch, *Charities and Charitable Foundations* Section 740 (1974).

For forty years, the Providence Society for Organizing Charity recognized and performed its fiduciary duties respecting Lakeside by:

> (a) placing the "management and control" in a special, newly constituted board of trustees ("Real Estate Managers"),
>
> (b) through lease provisions ensuring its operation for charitable work,
>
> (c) by retaining its trust title to the property and, most significantly,
>
> (d) by using the property exclusively for community charitable purposes.

Restatement (Second) of Trusts Section 348, Comments (a) and (b); 4 A. Scott on Trusts (3rd ed 1967) Section 364, 367 and 379; E. Fisch, *supra* Sec. 512, 513. *Mormon Church v. United States* 136 U.S. 1, 59 (1889).

Thus, the same result follows even if it be assumed *arguendo* that the Society did not incur charitable trust duties through its solicitation and acceptance of specially donated community funds. When coupled with the Society's chartered, charitable purposes (R.A. 19), the Society's subsequent declarations, actions and property use certainly suffice to create a self-imposed charitable trust. Restatement *supra*, Sec. 349 (a), [citing *Brice v. All Saints Memorial Chapel*, 31 R.I. 183, 76 A. 774 (1910)], and 351, Comment b. 4A. Scott, supra, Sections 349, 351, (p. 2794), 352 and 367. *Blocker v. State*, 718 S.W. 2d 409, 416 (Tex. App. - Houston [1st Dist.] 1986). R.I. General Laws, Section 18-9-4.

The Superior Court's 1951 acceptance and exercise of its *cy pres* authority over Lakeside was most appropriate. In 1951, CF&S was given a charitable trust title which was as restricted as the title (a) the Providence Society for Organizing Charity had held for Lakeside and (b) the school district had received from Elisha Watson in *South Kingstown v. Wakefield, supra* at 32. The court granted CF&S no unilateral authority to transfer the property ("to be held"). Moreover, any such construction attributed intentions to Judge Walsh which are in conflict with (a) the Supreme Court's ruling in *Wakefield*, (b) other decisions and authority confirming the Superior Court's exclusive, continuing jurisdiction*, and (c) the mandatory language of the *cy pres* statute itself ("shall"). [Surely, Real Estate Managers Sharpe, Gardner and Huddy would not have signed the deed if any such construction had been intended. R.A. 27-30.]

Judge Walsh was mindful of *Pell, Benedict, Payne, Wakefield, Williams* and *Thomas* (1949) *supra* when he entertained the Society's 1951 *cy pres* petition and the accompanying proof. (R.A. 26). The *cy pres* petition statement that there was no trust in the formal technical sense, is of no significance in view of the "charitable purposes which impelled the contributors to

*E.g. *Wakefield supra* at 32; *City of Providence v. Powers*, 83 R.I. 512, 514, 120 A.2d 811 (1956); *Faunce v. People's Savings Bank*, 46 R.I. 75, 80 124 A. 731 (1924); *Niles Post, supra* at 244; *Belcher v. Conway*, 179 Conn. 198, 425 A2d 1254, 1257-58 (Conn. 1979) and 15 *Am Jur 2nd, Charities*, Section 159.

bring about the conveyance" (Petition, par. 6; R.A. 22) and the "charitable purposes for which said real estate (had) "been held and used by the [initial charitable donee]." (February 16, 1951 order; R.A. 26).

Once the *cy pres* step has been initiated, the *cy pres* statute and charity law generally requires that all subsequent transactions regarding the title and the use of such property must be taken pursuant to proceedings, orders and decrees of the Superior Court so that such charity "may not fail..." Section 18-4-1 provides;

> "In all cases of charitable gifts of real or personal estate, whether by deed or will, where the purposes of the donor cannot be literally carried into effect, a complaint may be filed for a *cy pres* application of the trust property; and thereupon all such proceedings, orders and decrees *shall be had and taken* in said suit, to carry out the intents of the donor as near as may be, *that such charity may not fail*, and to this end application as aforesaid may be made in the same complaint for appointment of new trustee or trustees under or pursuant to the provisions of sections 18-2-1 to 18-2-8, inclusive, or under the general equity powers of the court."
> (emphasis added)

Significantly, no case has been found and the defendants have cited none, where once *cy pres* has been invoked, a successor charity's attempt to dispose of the property, unilaterally and without court authority, has been upheld.

Assuming *arguendo* that the Superior Court was mistaken in its 1951 acceptance and exercise of *cy pres* authority because Lakeside is not "trust property" — a difficult proposition to contemplate in view of the documented historical facts summarized above and CF&S' repeated admissions of trust title in its August 1987 memorandum* (R.A. 38-40) — the defendants are estopped and barred and the Superior Court is without power to overrule its 1951 *cy pres* decree. All necessary

*In a similar, almost *verbatim* restatement in its subsequent 1988 summary judgment memorandum, CF&S inserted the qualifying words "alleged" or "any alleged" trust. Compare R.A. 38-40 with R.A. 79-80.

parties asked the court to exercise power in an area where the court was authorized to act. (R.A. 23-25). CF&S accepted trust title pursuant to authority vested by the court's *cy pres* decree. (R.A. 26-28). CF&S and its privies may not now be heard to say that the 1951 court was mistaken. The defendants' position literally ignores the finality and the conclusiveness of judgments and undermines the permanency of charitable gifts. (See *Petition of Downer Home* 67 Wis. 2d 55, 226 N.W. 2d 444, 448-449, (1975); *R.I. Dairy Queen v. Burke* 101 R.I. 644, 647, 226 A.2d 420 (1967); *Bradford v. Burgess,* 20 R.I. 290, 295-296 (1897); *DiPrete v. Vallone,* 70 R.I. 286, 289, 38 A2d 769 (1944); *Air-Lite Products, Inc. v. Gilbane Building Company,* 347 A. 2d 623, 629-31 (R.I. 1975); *Super.* R. Civ. P., 60 (b) and 6 (b); RIGL, Section 9-21-2 and 9-21-6; 1 Kent *R.I. Civ. Proc* at Section 50.10; RIGL, Section 18-4-1 *supra.**

The Wisconsin Supreme Court gave short shrift to similar arguments in *Petition of Downer Home, supra*:

> "We deal here and now with the consequences, not the validity, of the 1965 court order. However, it is clear that the court in 1965 applied the doctrine of *cy pres* to redefine the purpose of the trust and the authority of the trustee. So we are puzzled by the state's now contending that *cy pres* is not applicable to this trust fund after sale of the Downer Home*** The State could have sought termination of the trust in 1965 when the Downer Home was sold. It is not likely that it would have succeeded, but, having consented to the sale of the real estate and modification of trust purposes in 1965, it certainly cannot now claim that *cy pres* was then inapplicable."

At most, the defendants have conjured up a mixed question of law and fact concerning the doctrine of charitable trusts. The court below should not have granted summary judgment, particularly where (a) pleadings, affidavits, documents and conflicts must be viewed in a light most favorable to the opposing party and (b) important discovery, including deposition notices and document requests addressed to the moving parties themselves, remain outstanding.

**In re College Street,* 11 R.I. 472, (1877) would support no different result becuase (a) all necessary parties were before the court and within its subject matter jurisdiction and (b) all such parties (and CF&S) requested (or consented to) the court's *cy pres* action. (R.A. 23-30, 66, 68, and 72, June 13, 1988 transcript 21, 27-29; *College Street supra* 474).

Excerpts from Plaintiffs' Petition for Reargument to Rhode Island Supreme Court (No. 88-0426), filed February 28, 1989.

Standing

Judge Bulman determined (and Judge Bourcier made no contrary summary judgment ruling) that the plaintiffs had made a sufficient showing of their standing to bring (and proceed) with this action. (Plaintiffs' January 13, 1989 brief 3-4, 14-15; see also R.A. 81-86). Plaintiffs demonstrated their own "injury in fact" (both economic and non-economic) and their "personal stake" in the controversey. Plaintiffs also presented urgent public issues which might be rendered moot if they were not allowed to proceed, the precise situation which allows representative plaintiffs to go forward without allegations of personal injury, (Plaintiffs' brief *supra* 15 and R.I. Supreme Court decisions cited therein; R.A. 84 and Audubon Society letter, R.A. 93, also annexed hereto). Indeed, the very failure of the Attorney General (or others), to commence or join in this suit to protect such unique recreational and environmental property is positive proof of the alternate standard (R.A. 84, 88-89, 91-93).

* * *

Home for Aged, Harvey and the ALR annotation *supra* were briefed by both sides before Judge Bulman (as well as Judge Bourcier). Plaintiffs' August 21, 1987 memorandum 7-8; R.A. 37-40, 81-85. Although duly served by both sides, the Attorney General submitted no papers and did not appear at the August 24, 1987 oral argument before Judge Bulman (The Court was informed, by CF&S counsel, that while the Attorney General did not join in CF&S; motion he would not "object" if the Court, acting without his urging, should choose to grant CF&S' Rule 12(b)(6) motion, R.A. 31-41.)

Judge Bulman, of course, denied CF&S' 12(b)(6) application — primarily addressed to plaintiffs standing — and held that the plaintiffs were entitled to proceed with full pre-trial discovery ("get their licks in"). Plaintiffs brief *supra* 14; R.A 89-92. No appeal was attempted and, most significantly, no effort made by any party to invoke certification. The Attorney General could have readily taken this step even without court permission if, as R.I.G.L. 19-24-27 provides, he was prepared to certify that in his opinion, the question was:

> "...of such doubt and importance and so affects the merits of the controversey that it ought to be determined by the

supreme court before further proceedings..."

Clearly, the Attorney General was *not* so inclined. However, if that step had been taken in 1987 and assuming *arguendo* that this court, upon full briefing, would have reached the same erroneous February 23 summary result, the plaintiffs would have at least been spared considerable time, effort and expense. As things turned out, having negotiated this "access barrier" (standing) the plaintiffs then proceeded to demonstrate, in spades, the "concrete adversity" that sharpens issues, the very objective which the "injury in fact"/"personal stake" test is designed to ensure. See, especially, *Blackstone Valley Chamber of Commerce v Public Utilities Commission,* 452 A.2d 931 at 932-33 (R1 1982) — plaintiff's brief *supra* 15.

Simply put, the court's February 23, 1989 summary standing ruling is (a) contrary to the Rhode Island statute (18-9-5) and the case law; (b) contrary to the standing rule's most basic purpose; and (c) manifestly unfair to most diligent plaintiffs.

* * *

Summary Judgment

Judge Bourcier wrote no opinion. Although he recognized in this Court's February 23 decision, his *sole* ultimate summary judgment finding was that Lakeside was "not subject to the application of the *cy pres* doctrine of law which pertains to trust property..." (R.A. 1-2). The "trust property" phase of the RI *cy pres* statute (R.I.G.L., Section 18-4-1, *infra*) refers not to an express trust, as the defendants argued below (and still do — see CF&S brief 15), but rather to "property held upon charitable trust." This Court so noted in *City of Providence v Payne,* 47 R.I. 444, 455, 133 A.621 (1926). Plaintiffs' brief *supra* 9.

Presiding Justice Walsh's 1951 *cy pres* decree thus represents a determination that Lakeside was held upon charitable trust by its initial charitable recipient, the Providence Society for Organizing Charity (now known as Family Service, Inc.) and, therefore, within Superior Court *cy pres* authority. Judge Bourcier clearly thought that Judge Walsh had been mistaken in making that determination and, because it pertained to jurisdiction, that he was free to rule otherwise — 37 years later and even on summary judgment. See June 13, July 1, 1988 transcript 21, 27-29, 39 ["That is jurisdictional when you come down to it. Jurisdiction can be raised any time, notwith-

standing the erroneous assumption of jurisdiction in the previous situation. That concludes the matter. We'll stand in recess." *Id* 39]

Judge Bourcier was wrong for two reasons — (1) *res judicata* and (2) summary judgment principles. Certainly, Judge Walsh possessed jurisdiction in the "fundamental sense" as defined in two recent decisions of this Court, *Hartt v Hartt* 397 A.2d 518, 523 (RI 1979) and *State v Souza* 456 A.2d 775, 779 (RI 1983). (CF&S' brief at 16-17 and to which the plaintiffs called attention during oral argument). All necessary parties were before Superior Court and asked the court to exercise power in an area where the court was authorized to act. The defendants were therefore barred and estopped and the Superior Court lacked authority to overrule its 1951 determination. [This was not a situation where the court had declared counsel a "General in the Mexican Army" a crucial distinction not recognized by the court below, (argument transcript 29, 39).] See also *Auto-Lite Products, Inc. v Gilbane Bulding Company*, 347 A 2d 623; 629-31 (RI 1975), and *Petition of Downer Home* 67 Wis. 2d 55, 226 N.W. 2d 444, 448-49, among other decisions and authority previously noted and quoted, in plaintiffs' prior memorandum, 13-14.

* * *

Attorney General's Position

During the February 13 oral argument and again in its February 23 order/decision, the Court was visibly impressed by an apparent Attorney General "opinion" or finding of "no fault" with CF&S' June 1987 unilateral sale of the Lakeside property for private development (*Id* 2). The record in this case contains *no* such opinion or finding — written or oral. Indeed, CF&S' ambiguous memorandum statement notwithstanding (p 13), the Attorney General was given *no* advance notice of the proposed sale.* (Huling affidavit, R.A. 89-90. See also CF&S' prior 1987 comments before Judge Bulman, R.A. 34, 38).

There are, however, other declarations and opinions -- in the Lakeside historical record and in the applicable case law — which do command the Court's attention. These include;

* * *

*CF&S' failure to give the Attorney General specific statutory, Superior Court notice is, in itself, grounds for nullifying the June 1987 conveyance. *Donnelly v Israel* 113 R.I. 27, 317 A.2d 443 (1974) Plaintiff's January 13 memorandum, *supra* 15 n.

Thus, going beyond the issues among the parties herein, the Attorney General's "sole standing" aspect of the Court's February 23 ruling, when coupled with the deference to, if not acceptance of, a thus-far undocumented Attorney General opinion or finding, represents a most unwise erosion of the Superior Court's longstanding ultimate responsibility for *cy pres* application.

Plaintiffs' Initial Complaint – Class Action, verified August 3, 1987 (appended documents deleted).

STATE OF RHODE ISLAND KENT, SC.	:	
WARWICK LAND TRUST, INC., PAUL HULING, JEANNE M. FOSTER EILEEN AUGHTON, and KATHLEEN PREISS, PLAINTIFFS	:	
VS.	:	C.A. No.: 87-0811
CHILDREN'S FRIEND AND SERVICE, INC., FRANK P. SHERRY, R & F ASSOCIATES, and JOHN DOES, ONE through FIVE, DEFENDANTS	:	
and JAMES O'NEIL, in his capacity as Rhode Island Attorney General	:	

COMPLAINT – CLASS ACTION

Plaintiffs, by their Attorneys, PEARLMAN & VOGEL, respectfully allege:

Parties

1. Plaintiff The Warwick Land Trust, Inc, is a non-profit, tax-exempt Rhode Island corporation located at 31 Lakecrest Drive, Warwick.

2. Plaintiffs Paul Huling, Jean M. Foster, Eileen Naughton and Kathleen Preiss are residents of Warwick, Rhode Island, and at all material times the owners of homes located on or near Warwick Pond.

3. Defendant Children's Friend and Services, Inc. ("Children's Friend"), is a Rhode Island non-profit corporation, organized exclusively for charitable purposes pursuant to Article III of Chapter 116 of the General Laws of Rhode Island, with an office at 2 Richmond Street, Providence.

4. Defendant Frank P. Sherry is a resident of 61 Wright Lane,

North Kingstown, Rhode Island.

5. Defendant R & F Associates is a Rhode Island partnership with an office at 1345 Warwick Avenue, Warwick, Rhode Island.

6. The Defendants John Doe One through Five are persons, presently unknown or not yet precisely identified, who are also believed to have aided and abetted or otherwise participated in the wrongful conduct hereinafter alleged.

7. James O'Neil is Rhode Island Attorney General. He is named as a party for the sole purpose of ensuring that complete relief may be granted.

FACTS

8. The plaintiffs' complaint is focused on some twenty acres located on the northerly end of Warwick Pond referred to in an annexed decree of this Court, entered February 16, 1951, and more particularly described in two purported successive instruments of conveyance also annexed hereto, each dated June 12, 1987.

9. Commencing more than seventy years ago and continuing until very recently, the foregoing Warwick Pond property, its land and building, and their use, has been restricted and devoted to remedial, recreational, and other charitable purposes.

10. By deeds executed in 1912 and 1916 the foregoing property was given to the Family Service, Inc. ("Family Service"), a charitable corporation of the State of Rhode Island whose chartered purpose was "organizing charitable work, diminishing pauperism and improving the condition of the poor."

11. The grantors were persuaded to make the foregoing charitable contributions because of the charitable use and purpose which would thus be served.

12. For some thirty-odd years thereafter under the aegis of Family Service, the foregoing Warwick Pond property was used for the benefit of community children, particularly those in need of medical care and recreation.

13. In or about 1950, Family Service concluded that the welfare of the community generally and the charitable

purposes which had caused the property's prior owners to convey the premises could best be served by transferring the land and building to the defendant Children's Friend "to be held by [Children's Friend] for its general use and purpose."

14. As indicated above in paragraph 3, Children's Friend was organized "exclusively" for charitable purposes. Upon this specific representation and for the apparent purpose of facilitating the aforementioned proposed transfer, the Rhode Island General Assembly amended Children's Friend's articles of incorporation to "take and hold ... real estate." See annexed statutory amendment, January Session, 1950.

15. Thereafter in February 1951, Family Service, upon notice to the Attorney General, petitioned this Court (Providence SC., No. 21550) for leave to transfer the aforementioned Warwick Pond property to Children's Friend, "to be thereafter held and used by it for its general use and purposes." In its pleading Family Service made specific reference to the beneficial work which Children's Friend had been carrying on for many years which would now be centered at the Warwick Pond property.

16. By reason of the foregoing representations Attorney General Powers filed a response, in effect consenting to Family Service's petition.

17. By the aforementioned annexed decree entered February 16, 1951, this Court authorized the proposed conveyance of Children's Friend "to be held for its general use and purposes", the Court noting that such use and holding would be "consistent with the intentions of the persons who caused the conveyance of said real estate to Family Services, Inc." Conveyance to Children's Friend then followed.

18. In accordance with the foregoing charitable purposes, representations, and conditions, Children's Friend, from 1951 until very recently in 1987, used and permitted the community to use the foregoing land and building for the care and development of children, many disadvantaged, and for boating, fishing, swimming, hiking, bird-watching, soccer, baseball, basketball, photography, and other beneficial community recreational purposes.

19. Nevertheless, later in 1987, at times and places unknown to the plaintiffs and without permission of or even notice to the Legislature, the Attorney General, or this Court and

notwithstanding the foregoing longstanding charitable purposes, representations, and conditions respecting its use and retention, the defendants embarked upon and have sought to implement a scheme to transfer and change the property's use from one of public use and enjoyment to one of private use and profit.

Such wrongful conduct is demonstrated by the following facts which, among others, will be brought to the Court's attention:

(a) a statement believed to have been made by the defendant Sherry in or about March 1987 that he had contracted to buy the Warwick Pond property and had filed plans with the City of Warwick to build 64 single-family homes thereon;

(b) an alleged deed of conveyance from Children's Friend, annexed hereto, filed June 12, 1987 at 2:*13* p.m., purportedly transferring the property to defendant Sherry for $900,000;

(c) a second alleged deed of conveyance, also annexed hereto, filed June 12, 1987, 2:*14* p.m., whereby defendant Sherry purportedly transferred the property to defendant R & F Associates for $1,500,000;

(d) a host of subsequent efforts, without disclosing the facts depicted above, to persuade if not pressure various governmental officials prematurely and illegally to permit or acquiesce to physical changes to the property before the Legislature, the Attorney General, this Court, the plaintiffs, and the Warwick community generally realized what was happening to Warwick Pond and its neighborhood.

20. By reason of the premises the plaintiffs, their neighbors, their homes, and their community stand to suffer substantial damages — recreational, environmental, and monetary.

Count I — Declaratory Judgment

21. As described in paragraphs 1-20, the conveyance(s) represented by the purported June 12, 1987 deeds are, and should be declared, void *ab initio*.

Count II — Breach of Trust

22. The wrongdoing depicted in paragraphs 1-21 constitutes

breach of public and charitable trust.

Count III — Fraud and Deceit

23. The wrongdoing depicted in paragraphs 1-22 constitutes fraud and deceit.

Class Action Allegations

24. As indicated above, plaintiffs bring this action individually and on behalf of all Warwick community members, and others, especially those residing on or near or using Warwick Pond.

25. The total number of all class members is so large that their joinder would be impracticable.

26. As residents on or near Warwick Pond, the designated plaintiffs have a special interest in this suit and its diligent pursuit.

27. The questions of law and fact raised herein are common to all members of the class.

28. The claims presented by the designated plaintiffs herein are representative of, if not identical to, the other class members.

29. The designated plaintiffs will fairly and adequately represent the class in that (a) competent counsel have been retained; (b) they have no potential or actual conflict of interest with other possible members of the class; and (c) they can acquire the financial resources to ensure that the interests of the class will not be harmed.

WHEREFORE plaintiffs pray as follows:

1. Declaratory judgment that the foregoing purported conveyances are void *ab initio*;

2. Compensatory and/or punitive damages and forfeiture in sums as the Court may deem appropriate;

3. Reimbursement of their reasonable counsel fees, disbursements, and court costs;

4. Permission to file *lis pendens*;

5. Preliminary and permanent restraining orders; and

6. Other and further relief as the Court deems just.

By Their Attorneys,
PEARLMAN & VOGEL
(Signed) Arlene Violet
(Signed) Robert S. Stritt
Attorneys-at-Law
750 East Avenue
P.O. Drawer 9007
Providence, Rhode Island 02940
Tel.: (401) 726-6200

Dated: August 4, 1987

Plaintiffs Demand Trial By Jury Where Applicable.

The allegations herein are true to the best of my knowledge and belief.

(Signed) Jeanne M. Foster

Subscribed and sworn to me this 3rd day of August, 1987, in the City of Warwick and State of Rhode Island.

(Signed) Deborah Ann Bradford
Notary Public